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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-977

HULAN E. JACK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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January 9, 1973

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To: The Honorable, the Chief Justice of the United States, and the Associate Justices of the United States Supreme Court

The petitioner, Hulan E. Jack, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on December 12, 1972.

Opinion Below

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the Southern District of New York.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on December 12, 1972 and is set forth in the Appendix hereto.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

No extension of time within which to file the instant petition has been sought.

Question Presented

1. Whether the term "willfully violates" in 29 U.S.C. §186 requires the government, in a prosecution under that statute, to prove that defendant was aware of the restrictions of the statute or acted in reckless disregard of it.

Statutory Provision Involved

United States Code, Title 29, Section 186.

Statement of Case

This case concerns the operations from 1966 to 1970 of Coordinated Community Services, Inc. ("CCS"), a private stock corporation, whose shares were owned by four persons. There was no dispute as to stock ownership by three persons: Hulan E. Jack, Theodore Solomon and Harry Rosenblum. As to the owner of the remaining shares, the government argued that it was L. Joseph Overton; the defense contended that it was his brother, Lawrence J. Overton.

During the period in question, L. Joseph Overton was the business agent in the Harlem area for Local 338, Retail, Wholesale Chain Store Food Employees Union, AFL-CIO ("Local 338") and Lawrence J. Overton served periodically on the union's Welfare Board and Executive Board. Solomon was an officer of a Harlem association of 70 grocery store owners whose employees were members of Local 338. Rosenblum owned two of these grocery stores. Petitioner was a New York State Assemblyman; he was neither an employer, employer representative, nor union official (R. 97, 100, 116, 123, 993).*

CCS had contracts with six food manufacturers to promote their products among retail grocers in the Harlem area. Pursuant to these contracts, CCS solicited store owners, requesting that they stock the products of these six manufacturers. CCS's funds, derived from the manufacturers for this promotional work, was distributed to each of the CCS stockholders by checks drawn on the CCS bank account

* References noted "R" are to the typewritten minutes of trial.

which were signed jointly by petitioner together with either Solomon or Rosenblum (R. 116, 123, 249, 280, 381, 517-20, 848-9).

Count one of the indictment, filed December 8, 1970, charged petitioner, Solomon, Rosenblum and the Overton brothers with conspiracy (Title 18 United States Code Section 371) to violate Title 29 United States Code Section 186 by soliciting agreements from retail grocery employers of Local 338 employees to purchase the products of the manufacturers represented by CCS.

Counts four through twelve of the indictment charged petitioner as an aider and abettor (Title 18 United States Code Section 2) of Solomon and Rosenblum in substantive violations of Title 29 United States Code Section 186, committed by the payment of the CCS checks signed jointly by petitioner and at various times, Solomon or Rosenblum, both Local 338 employers, and distributed to the Overtons, representatives of Local 338 employees.

In regard to these counts, the only charges against petitioner in the indictment that were submitted to the jury, he requested the following instruction on the element of willfulness:

> "The term 'willfully violates' in Section 186(d) contemplates proof of an awareness of the restrictions of that section or a reckless disregard for that section."

The trial court denied this request (R. 1136), charging instead, on this issue, the following:

> "A general intent to commit the act charged need only be proved. The government must prove only that

the defendant whose guilt or innocence you are considering knowingly did the act which the law forbids, but it need not be shown that the defendant whose guilt or innocence you are then considering knew of or purposely intended to violate the law.

A defendant's intent to conspire as charged may be determined from all the facts and circumstances surrounding the case. However, ignorance of the law forbidding an alleged unlawful act, even if it be a fact, is no defense either to the charge of conspiracy here made, which is Count 1, or to the charge as contained in Counts 4 through 21.

An act or failure to act is only done within the meaning of the statute here if it is done voluntarily and intentionally and not because of mistake or accident'' (R. 1340-1).

Convicted on Count one and Counts four through twelve, petitioner was sentenced to three months in prison with the balance of a one-year term suspended, and fined $5,000.

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Reasons for Granting the Writ

The decision below conflicts with the decisions of other Courts of Appeals as to the proper construction of 29 U.S.C. Section 186.

In upholding the trial court's rejection of petitioner's requested instruction on willfulness, the Second Circuit stated that Jack's request was based "squarely" on the language of the Seventh Circuit decision in *United States* v. *Inciso*, 292 F.2d 374, 380 (7th Cir. 1961), Appendix, p. A18. The opinion below on the construction of this essential element of 29 U.S.C. §186 is clearly in conflict with that of the Seventh Circuit in *Inciso*.

Although as noted in the opinion below, *Inciso* "may have been subsequently modified" by the Seventh Circuit decisions, that court has not reversed its ruling on the issue of willfulness (Appendix, p. A18). More significantly, decisions of both the Tenth and Fifth Circuits on the essential element of willfulness in 29 U.S.C. §186 directly conflict with that of the Second Circuit.

In *Korholz* v. *United States*, 269 F.2d 897 (10th Cir. 1959), the Tenth Circuit held "accurate" the following instruction on willfulness in a 29 U.S.C. §186 prosecution:

> "A defendant who actually does violate the provisions of law here involved would not be guilty of a criminal offense unless he is either conscious of the fact that what he is doing constitutes a violation of the law or unless he wholly disregards the law and pursues a course without making any reasonable effort to deter-

> mine whether the plan he is following would constitute a violation of law or not" [*id.* at 903].

This construction of the statute is substantially the same as that of the Seventh Circuit in *Inciso.*

And, the Fifth Circuit in *United States* v. *Fischetti,* 450 F.2d 34, 39 (5th Cir. 1971), approvingly cited *Inciso* in ruling on the issue of willfulness in a 29 U.S.C. §186 prosecution. On this issue, the Fifth Circuit in *Fischetti* also based its ruling on *United States* v. *Motzell* (D. N.J. 1961), a district court opinion which adopted the Tenth Circuit's construction of willfulness in *Korholz, supra.*

Further, the opinion below on 29 U.S.C. §186, a *malum prohibitum* statute, conflicts in general principle with the holding of this Court on the definition of willfulness in another *malum prohibitum* statute. Ruling on the meaning of the term "willfully" in a statute concerning acts of railroad carriers, this Court stated:

> "[I]t means purposely or obstinately and is designed to describe the attitude of a carrier, who, having a free will or choice, either intentionally disregards the statute or is plainly indifferent to its requirements" [*United States* v. *Illinois Cent. R. Co.,* 303 U.S. 239, 242-3 (1938)].

Particularly unjust is the application of the Second Circuit's stringent definition of willfulness to petitioner. Neither an employer nor representative of employees, the categories of persons specifically covered by the provisions of 29 U.S.C. §186, he was outside the immediate focus of the statute.

In sum, the conflict in the Courts of Appeals on the proper construction of this key provision of the Taft-Hartley Law, heavily relied on in federal prosecutions, justifies this Court's granting the petition for certiorari.

Conclusion

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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January 9, 1973

APPENDIX

Statute in Question

29 United States Code Section 186

Restrictions on payments and loans to employee representatives, labor organizations, officers and employees of labor organizations, and to employees or groups or committees of employees; exceptions; penalties; jurisdiction; effective date; exception of certain trust funds

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with

intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in part II of the Interstate Commerce Act) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: *Provided,* That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

(c) The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former em-

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ployee of such employer, as compensation for, or by reason of his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided,* That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided,* That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident

insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; or (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: *Provided*, That the requirements of clause (B)

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of the proviso to clause (5) of this subsection shall apply to such trust funds.

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of Title 28 (relating to notice to opposite party) to restrain violations of this section, without regard to the provisions of section 17 of Title 15 and section 52 of this title, and the provisions of sections 101-115 of this title.

(f) This section shall not apply to any contract in force on June 23, 1947, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) Compliance with the restrictions contained in subsection (c) (5) (B) of this section upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c) (5) (A) of this section be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits. June 23, 1947, c. 120, Title III, §302, 61 Stat. 157; Sept. 14, 1959, Pub.L. 86-257, Title V, §505, 73 Stat. 537.

Judgment of Court Below

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 290, 291, 292—September Term 1972

Argued November 2, 1972 Decided December 12, 1972

Docket Nos. 72-1730, 72-1767, 72-1768

UNITED STATES OF AMERICA,

Appellee,

against

L. JOSEPH OVERTON, LAWRENCE J. OVERTON and HULAN JACK,

Defendants-Appellants.

Before LUMBARD, FEINBERG and OAKES, Circuit Judges.

Appeals from judgments of conviction entered in the United States District Court for the Southern District of New York, Sylvester J. Ryan, J., after jury trial, for conspiring to violate 29 U.S.C. §186, and, as to two appellants, for substantive violations of that section.

Affirmed.

FREDERICK P. HAFETZ, New York, N.Y. (Moses L. Kove, on the brief) for Appellants Lawrence J. Overton and Hulan E. Jack.

SAMUEL A. NEUBURGER, New York, N.Y. (Nathan H. Mitchell, on the brief) for Appellant L. Joseph Overton.

EDWARD J. KURIANSKY, Assistant United States Attorney (Whitney North Seymour, Jr., United States Atttorney for the Southern District of New York; William D. Gray and John W. Nields, Jr., Assistant United States Attorneys, on the brief) for Appellee.

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Opinion of Court Below

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 290, 291, 292—September Term, 1972.

(Argued November 2, 1972 Decided December 12, 1972.)

Docket Nos. 72-1730, 72-1767, 72-1768

UNITED STATES OF AMERICA,

Appellee,

against

L. JOSEPH OVERTON, LAWRENCE J. OVERTON, and HULAN JACK,

Defendants-Appellants.

FEINBERG, *Circuit Judge*:

These appeals involve a scheme alleged to violate 29 U.S.C. §186, an enactment intended to safeguard the integrity of the collective bargaining process. Appellants L. Joseph Overton, his brother Lawrence J. Overton, and Hulan Jack were convicted after a two and one-half week jury trial in the United States District Court for the Southern District of New York, Sylvester J. Ryan, J., of conspiracy to violate section 186. 18 U.S.C. §371. L. Joseph Overton was also convicted on nine counts which charged receipt of certain payments of money in violation

of that section; Hulan Jack was also convicted on nine counts which charged the aiding and abetting of substantive violations by the making of those payments. 18 U.S.C. §2. On June 6, 1972, Judge Ryan sentenced L. Joseph Overton to a term of imprisonment for one year, six months to be served, six months suspended, followed by probation for three years; the judge also imposed a $10,000 fine. Hulan Jack was sentenced to three months in prison, with the balance of a one-year term suspended, and was fined $5,000.[1] Lawrence J. Overton was given a one-year suspended sentence and a $10,000 fine. Appellants individually and together raise a number of contentions on appeal. We find none of them persuasive, and affirm the judgments of conviction.

I

The Government's evidence—which, where controverted, could be and apparently was believed by the jury—showed the following. The conspiracy, which ran from 1966 to late 1970, centered around the union influence of L. Joseph Overton, Business Agent for Harlem of Local 338, Retail, Wholesale Chain Store Food Employees Union, AFL-CIO ("Local 338"). Co-conspirator Lawrence Overton, brother of Joseph, was likewise active in the union, and during the period in question served periodically on its Welfare Board and on its Executive Board. Both men also played considerable roles in the formation and operation of

1. These sentences were imposed on Count 1, the conspiracy count. On the remaining counts these appellants received identical sentences of one year suspended and three years probation, to run concurrently with sentences imposed on the conspiracy conviction.

Coordinated Community Services, Inc. ("CCS"), a principal tool of the conspiracy.

CCS was a private stock corporation formed in early 1966. The four original shareholders—each with 25 per cent of the stock—were Joseph Overton, Hulan Jack, Theodore Solomon, and Harry Rosenblum. Solomon was executive secretary of Associated Grocers of Harlem, Inc. ("AGH"), which represented 70 Harlem grocery stores and supermarkets and which negotiated and signed labor contracts with Joseph Overton and Local 338. Rosenblum was the owner of two grocery stores which were members of AGH and which adhered to the AGH-Local 338 labor contracts.[2] Shortly after organization of CCS, Joseph Overton purported to transfer his interest in CCS to another corporation, Emancipation March, Ltd., principally controlled by his brother Lawrence. The jury could find, however, as the Government urged, that this was merely an attempt at concealment and that Joseph Overton at all times remained a real CCS shareholder in interest. Once organized, CCS entered into contracts with six large and well-known food manufacturers. In return for fees from them which totalled as much as $80,000 per annum, CCS undertook to promote their products among the grocers and larger food retailers of Harlem. Promotional efforts were principally visits from Lawrence Overton, salaried as "Director of Operations" for CCS, and from his assistant in this capacity, Leonard Faust, brother-in-law of Joseph

2. Solomon and Rosenblum were convicted on the conspiracy count and on various counts charging substantive violations. Sentences of one year imprisonment, imposed upon each, were suspended. Rosenblum was fined $5,000; Solomon, $2,500. They do not appeal.

Overton.[3] Evidence disclosed that Joseph Overton intervened directly with a retailer on at least one occasion; so, too, did Hulan Jack. Jack, Faust, and Lawrence Overton were all known in the Harlem community, and their personal relationship and business affiliation with Joseph Overton were known generally by retailers with whom they dealt.

The parties disagree as to how properly to characterize the corporate purposes of CCS. Appellant Jack testified that CCS operated simply as a public relations consultant, striving to improve the image of the products of its clients in the black community in Harlem. The Government, on the other hand, argues that the primary, if not sole, corporate purpose was to exploit the enormous union power of Joseph Overton to the pecuniary benefit of the corporate principals. Doubtless, the jury accepted the latter view. It is precisely this exploitation which the framers of section 186 viewed as inimical to constructive labor-management relations. Food retailers who employed union labor or employees who might seek representation by Local 338 could reasonably anticipate labor difficulties were they unwilling to purchase products of CCS clients. Once having agreed to patronize manufacturers represented by the Overtons through CCS, these retailers would probably expect fewer problems with the union. See *United States* v. *Ryan*, 225 F.2d 417 (2d Cir. 1955) (L. Hand, J., dissenting), rev'd, 350 U.S. 299 (1956) ("Congress wished to prevent employers from tampering with the loyalty of

3. Faust was indicted and tried as a co-conspirator. The jury was unable to agree on his guilt and a mistrial was declared.

union officials and disloyal union officials from levying tribute upon employers.") In short, the desire to make profits for CCS threatened to become the exclusive determinant of the adequacy with which employee interests were represented. That CCS offered a vehicle for subverting congressional purpose is thus clear. Whether the Government proved that appellants' conduct fell within the technical proscriptions of the statute, as charged in the indictment, is the principal question before us.

II

Appellants argue that the Government's evidence was insufficient to prove elements of the conspiracy as alleged in the first count of the indictment. Section 186(b) of Title 29 makes it unlawful for any person to

> request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) . . .

Section 186(a) in turn prohibits the payment or delivery, by an employer or person acting "in the interest of an employer," of "any money or other thing of value"—

> (1) to any representative of any of his employees who are employed in an industry affecting commerce; or (2) to any labor organization, or any officer or employee thereof, which represents, *seeks to represent, or would admit to membership*, any of the employees of such employer . . . . [Emphasis added.]

Appellants concede that there was sufficient evidence of a violation of sections 186(b) and (a)(2); they admit that grocer-employers of clerks who *could be* represented by

Local 338 were solicited for a "thing of value"—i.e., purchase of the products of clients represented by CCS. But, they contend, such a violation was not charged since the indictment specified only requests to and solicitations of employers whose employees were *already* members of the union, and thus only charged a conspiracy to violate 186(b) and (a)(1); because the Government proof did not establish requests to or demands of employers actually—as opposed to potentially—employing members of Local 338, there was no proof whatsoever of the crime charged.

To this, the United States makes a two-fold reply: Appellants have simply misread the indictment; and even under their erroneously narrow reading, there was sufficient evidence to prove the charge. The second argument is clearly correct. It must be remembered that the crime alleged was conspiracy—an unlawful agreement to solicit contracts from grocer-employers of members of the local. Even if no actual solicitation of grocer-employers was established, proof of an agreement to solicit would alone suffice. Here the Government introduced a CCS memorandum for a client which outlined specific programs designed to solidify CCS good will among store clerks: These included "special nights honoring members of the retail union" and occasions on which CCS would host "membership meetings of the union, serving the products of our sponsor." A letter to a second client stated that:

> A sustained campaign is waged by CCS to increase the demand . . . by soliciting the cooperation of the stores . . . on behalf of the products we sponsor. In addition, CCS has a good working relationship with the clerks.

We think this language, taken in context, is adequate to warrant the inference that the clerks and union members referred to were employees of the grocers solicited. The further inference—that solicitation of grocers actually employing Local 338 members was a primary purpose of the conspiracy—seems also justified.

On this view, it is unnecessary to deal at length with appellants' claim that the indictment did not also charge a conspiracy to violate subsection (a)(2) of section 186. We conclude that it did, as set forth in a footnote below.[4]

III

Appellants Joseph Overton and Jack assert that the legal theory under which the various substantive violations went to the jury was erroneous as a matter of law and misinterprets the purpose of the statute. This theory—wholly different from the one which supported the conspiracy count—assumes that payments in the form of CCS checks, signed by defendants Rosenblum and Solomon (aided and abetted by appellant Jack), made to appellant Joseph Overton gave rise to criminal liability under the prohibition of section 186. Appellant Jack's violations were in aiding and abetting these payments; appellant Joseph Overton's were

4. Appellants argue that paragraph 2 of Count One, which refers in terms only to section 186(a)(1), is the sole definition of the conspiracy grounded squarely on the language of the statute. They regard paragraph 3, which tracks the language of 186(a)(2), as mere amplification of Joseph Overton's role in the conspiracy. A fair reading of the first count, however, reveals that paragraphs 2 and 3, following generalized allegations of conspiracy in paragraph 1, together point up the dual objective of the conspirators, and both serve to link the conspiracy to the two statutory subsections equally implicated. Just as clearly, Joseph Overton's role is more fully set out, not in paragraph 3 at all, but in paragraph 4.

in receiving them. In two somewhat related ways, appellants argue that these payments did not violate 29 U.S.C. §186.

Appellants claim that the payments by Rosenblum and Solomon, who were concededly employers of grocery clerks, were made not on their own behalf, but for their corporation, Coordinated Community Services, Inc.; that CCS was not itself an employer as required by section 186; and that although the jury could properly convict if it found that CCS was acting "in the interest" of employers Rosenblum and Solomon when the payments were made, this theory was never submitted to the jury. The argument is without merit. The jury was adequately charged that it had to find that Rosenblum and Solomon were employers, that on specified dates of payments to Joseph Overton, Rosenblum and Solomon were employers or acting in the interest of employers, and that the checks were made and delivered by Rosenblum and Solomon and received by Joseph Overton. This was sufficient. Payments by these employers, though made through a non-employer corporate instrumentality, are nevertheless within the prohibition of the statute. Cf. *United States* v. *Ferrara*, 458 F.2d 868 (2d Cir. 1972), and *United States* v. *Iozzi*, 420 F.2d 512 (4th Cir. 1970), cert. denied, 402 U.S. 943 (1971), affirming convictions for payments made to labor representatives by a non-employer business entity where a principal thereof owned or controlled or was a key officer of another corporation which was an employer. The Supreme Court has characterized section 186 as "a criminal provision * * * which outlaws *all* payments with stated exceptions [not here relevant] be-

tween employer and representative." *United States* v. *Ryan*, 350 U.S. 299, 305 (1956) (emphasis added). We see no reason why in this case the corporate scheme devised by these defendants insulated them from criminal liability.

Similar reasoning leads us to reject a parallel contention that because the payments in question were merely internal distribution of profits, they cannot serve as a predicate for conviction. Appellants rely on dictum to this effect in *United States* v. *Lippi*, 190 F. Supp. 604 (D. Del. 1961). Whatever may be the persuasiveness of the reasoning in *Lippi*, which appears to ignore the literal language of the statute, we find that decision inapposite to the facts here. *Lippi* involved a dividend distribution by an operating coal company to its shareholders, one of whom was an officer of the United Mine Workers Local representing the company's employees. Though the CCS payments to Overton can also be labelled "dividends," they stand on rather different footing. Unlike *Lippi*, a union official here became a shareholder of the corporation whose very purpose, the jury could find, was to exploit his own union power.

IV

Appellants contend that the trial judge deprived them of a fair trial when he admitted testimony concerning a labor dispute fomented by Joseph Overton with the Harlem River Consumers Cooperative for the purpose of coercing it to buy products promoted by CCS. Interference with interstate commerce by threats or violence is a felony, punishable by imprisonment for up to 20 years, under a separate provision of the United States Code, 18 U.S.C. §1951 (the

Hobbs Act). Appellants argue that this evidence was irrelevant to the lesser crime here charged, was beyond the scope of the indictment, and was unduly prejudicial. We find these arguments unpersuasive.

Evidence of coercive behavior, punishable under the Hobbs Act, is competent and relevant to prove a conspiracy to violate section 186, which contemplates a "situation where an employee representative might resort to pressure to obtain payment by conduct that may be characterized as coercive." *United States* v. *Kramer*, 355 F.2d 891, 896 (7th Cir.), cert. denied, 384 U.S. 100 (1966);[5] see *Arroyo* v. *United States*, 359 U.S. 419, 425-26 (1959); cf. *United States* v. *Ryan*, 232 F.2d 481, 483 (2d Cir. 1956). Joseph Overton's threats against the "Harlem Co-op" were part and parcel of the conspiracy to request and demand things of value from employers whose employees Local 338 sought to represent. See note 4 supra and accompanying text. Whether or not Lawrence Overton and Hulan Jack knew of the precise methods chosen by Joseph Overton to secure the cooperation of given employers, they are responsible as conspirators, for acts taken by a co-conspirator to further the purposes of their agreement, see, e.g., *Pinkerton* v. *United States*, 328 U.S. 640, 647 (1946); evidence of such methods is surely relevant even as to unknowing co-conspirators. Moreover, any assertion that proof of Joseph Overton's coercive threats was properly excludible as beyond the scope of the indictment is legally unsound. Cf. *Korholz* v. *United States*, 269 F.2d 897, 901 (10th Cir. 1959), cert. denied, 361 U.S. 929 (1960); *United States* v. *McMaster*, 343 F.2d 176, 181 (6th Cir.), cert. denied, 383 U.S. 818

5. Certiorari was granted in part on an issue not relevant here.

(1965). Such an assertion is factually erroneous as well—the indictment specified as an overt act a meeting between Joseph Overton and Cora Walker, a founder of the Co-op. Finally, there is the claim that the evidence was "prejudicial." Of course it was, in the sense that it helped the Government's case. But we have already held the evidence admissible; appellants argue that it should have been excluded because overtones of other crimes or sympathy for the Co-op might arouse hostility toward them. Whether such a ruling would have been correct on this record is doubtful; from appellants' point of view, at best this was a matter for the judge's discretion. In other rulings, the judge did not hesitate to exercise his power and protect defendants' rights when he thought appropriate.[6] His failure to exclude this evidence must have reflected a judgment —which we share—that its admission could not fairly be regarded as denying defendants a fair trial.

V

Appellant Jack requested that Judge Ryan charge the jury on the element of wilfulness as follows:

> The term "wilfully violates" in section 186(d) contemplates proof of an awareness of the restrictions of that section or a reckless disregard for that section.

The requested charge is squarely based on language in *United States* v. *Inciso*, 292 F.2d 374, 380 (7th Cir. 1961).

6. Judge Ryan severed trial on two counts which charged Hulan Jack and Joseph Overton with perjury on the ground that it would deprive defendants Rosenblum and Solomon of a fair trial. Further, the judge refused to allow the United States to prove these false statements as circumstantial evidence of guilty consciousness.

Without regard to whether *Inciso* may have been subsequently modified by the Seventh Circuit itself, see *United States* v. *Keegan*, 331 F.2d 257, 261-62 (7th Cir.), cert. denied, 379 U.S. 828 (1964), the requested charge was properly rejected. In *United States* v. *Ricciardi*, 357 F.2d 91, 100 (2d Cir.), cert. denied, 384 U.S. 942 (1966), an appellant called attention to *Incisco*[7] and made precisely the same argument urged here. Nonetheless, we affirmed the lower court's refusal to give a charge substantially identical to the one requested by Jack; we reaffirm the validity of *Ricciardi*.

Appellant L. Joseph Overton raises several further claims. He argues that the trial judge erroneously denied his request for a nonjury trial; that empanelling an alternate juror after he had been placed in jeopardy was improper; and that the delay between indictment and trial exceeded what is permissible under our Rules Regarding Prompt Disposition of Criminal Cases. We have carefully considered these claims but have concluded that no reversible error was committed.

Judgments affirmed.

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7. Brief for Appellant Unger 39-40.

In the Supreme Court of the United States

OCTOBER TERM, 1972

Nos. 72-977

HULAN E. JACK, PETITIONER

v.

UNITED STATES OF AMERICA

No. 72-978

L. JOSEPH OVERTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App.[1] A7-A18) is not yet reported.

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[1] "Pet. App." throughout this brief refers to the appendices to the *Jack* petition in No. 72-977.

JURISDICTION

The judgment of the court of appeals was entered on December 12, 1972. The petitions for writs of certiorari were filed on January 11, 1973 (Pet. App. A6). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Petitioner Jack:

1. Whether the trial court properly instructed the jury on the issue of willfulness.

Petitioner Overton:

2. Whether the trial court properly denied petitioner's request for a trial by the court.

3. Whether petitioner was placed in double jeopardy by the selection of an additional alternate juror.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioners Overton and Jack were convicted of having violated provisions of the Taft-Hartley Act, 29 U.S.C. 186, and of having conspired to commit the substantive offenses, in violation of 18 U.S.C. 371. Petitioner Overton was sentenced to a one-year term of imprisonment, with execution of six months suspended, to be followed by a three year period of probation, and fined $10,000. Petitioner Jack was sentenced to one year imprisonment, with all but three months suspended, to be followed by three years' probation, and fined $5,000. The court of appeals affirmed (Pet. App. A6).

The evidence, the sufficiency of which is not in dispute, is set forth in detail in the opinion of the court below. Briefly, it showed that petitioners were part of a conspir-

acy which operated from January 1966 until late 1970. The purpose of the conspiracy was to exploit the influence which petitioner Overton, in his capacity as business agent for Harlem Local 338, AFL-CIO, exercised over retail grocers who employed members of that local. Petitioners, together with codefendants Rosenblum and Solomon, formed Coordinated Community Services, Inc. (CCS), a corporation which entered into contracts with various food manufacturers to promote their products in those grocery stores and supermarkets which employed or might employ members of Local 338. Retail merchants whose employees were represented by Local 338 were informed that they could expect labor difficulties if they were unwilling to purchase the products of CCS clients. By means ranging from mere solicitation to use of an illegal strike called by petitioner Overton himself, CCS was able to persuade the retailers to purchase from its clients; in return, CCS was paid substantial commissions by the manufacturers it represented.

ARGUMENT

1. Petitioner Jack contends that the trial court erred in refusing to charge the jury that the phrase "willfully violates" in 29 U.S.C. 186(d) "contemplates proof of an awareness of the restrictions of that section or a reckless disregard for that section." We submit that the court properly instructed the jury that "[a] general intent to commit the act charged need only be proved * * *. * * * [I]gnorance of the law forbidding an alleged unlawful act * * * is no defense * * *" (Tr. 1340-1341).[2]

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[2] The complete charge on this issue was as follows:

> A general intent to commit the act charged need only be proved. The government must prove only that the defendant whose guilt or innocence you are considering knowingly did the

Although, as petitioner notes, certain *malum prohibitum* offenses require specific intent to evade a legal obligation, the misdemeanor statute involved here is not within that exception. *United States* v. *Lanni*, 466 F. 2d 1102, 1110 (C.A. 3); *United States* v. *Ricciardi*, 357 F. 2d 91, 100 (C.A. 2), certiorari denied, 384 U.S. 942; *United States* v. *Carter*, 311 F. 2d 934 (C.A. 6), certiorari denied *sub nom. Felice* v. *United States*, 373 U.S. 915; *Brennan* v. *United States*, 240 F. 2d 253 (C.A. 8), certiorari denied, 353 U.S. 931. Any contrary suggestion in the language of the decision of the Seventh Circuit in *United States* v. *Incisco*, 292 F. 2d 374, has been disapproved by the later holding of that court in *United States* v. *Keegan*, 331 F. 2d 257, 262, certiorari denied, 379 U.S. 828.[3]

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act which the law forbids, but it need not be shown that the defendant whose guilt or innocence you are then considering knew of or purposely intended to violate the law.

A defendant's intent to conspire as charged may be determined from all the facts and circumstances surrounding the case. However, ignorance of the law forbidding an alleged unlawful act, even if it be a fact, is no defense either to the charge of conspiracy here made, which is Count 1, or to the charge as contained in Counts 4 through 21.

An act or failure to act is only done within the meaning of the statute here if it is done voluntarily and intentionally and not because of mistake or accident.

[3] *United States* v. *Fischetti*, 450 F. 2d 34 (C.A. 5), certiorari denied, 405 U.S. 1016, upon which petitioner also relies, is not in conflict with the decision below. The court in *Fischetti* merely held that since willfulness is an element of the offense it must be alleged in the indictment. The court there expressed no view concerning the appropriate standard of willfulness. The Tenth Circuit, as petitioner points out, in *Korholz* v. *United States*, 269 F. 2d 897, certiorari denied, 361 U.S. 929, termed as "accurate" an instruction which required the jury to find either specific intent to violate Section 186 or reckless disregard for the law, but the court did so in the course of affirming a conviction under that more stringent test. Since the

2. Petitioner Overton claims that the district court committed reversible error in denying his request for a non-jury trial. He argues that the prosecution should not have been permitted, without an appropriate showing of good faith, to withdraw its earlier oral consent to a jury-waived trial.

At a pretrial conference for the purpose of fixing a date certain for trial on November 5, 1971, defendants indicated for the first time their willingness to proceed without a jury. The defendants gave no reason for wanting to forego jury trial other than to expedite matters. After the court indicated that government consent was required to effectuate the defense's waiver of a jury trial, the prosecutor stated that the government was prepared to accept a waiver. At this point, the court stated that the waiver would not go into effect until each defendant had been advised of his right to a jury trial and all the parties had submitted their consent in writing.

When the parties reconvened on the following day, the prosecution stated that it had reexamined its position and decided not to consent to defendants' waiver of jury trial. The defendants did not object, but urged the court to inquire into the reasons underlying the government's decision. The court declined, noting that neither the defendants nor the prosecution had yet executed the written consent necessary to an effective waiver. This ruling was proper.

It is well settled that a defendant has no absolute right to be tried by a judge alone. *Singer* v. *United States*,

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instruction approved there was favorable to the defendant, the court was not required to focus closely on the appropriate willfulness standard.

380 U.S. 24. Rule 23, Fed. R. Crim. P., unequivocally conditions a non-jury trial upon the consent of the prosecution and further states that a waiver must receive the full sanction of the trial court before it becomes effective. This is in accordance with this Court's decision in *Patton* v. *United States*, 281 U.S. 276, 312. Here, as noted by the district court, no written waiver had been executed and the government was not required to "articulate its reasons for demanding a jury trial." *Singer* v. *United States, supra*, 380 U.S. at 37. See, also, *United States* v. *Simon*, 425 F. 2d 796, 799 n. 1 (C.A. 2), certiorari denied, 397 U.S. 1006.

3. Petitioner Overton also argues that the trial court erred in empanelling an alternate juror after petitioner had been placed in jeopardy. However, a review of the relevant facts shows that this claim is without merit.

On April 6, 1972, twelve jurors and two alternates were selected and sworn. The following day, one of the jurors was excused with the consent of all parties and an alternate replaced her. The trial judge then summoned a new panel of six veniremen and a new alternate was selected. The defendants were given three additional peremptory challenges, which could be directed at any of the twelve regular jurors or either of the two alternates. All defendants declined to exercise these peremptory challenges and the court withdrew the additional challenges which had been given to to the government. The trial proceeded to verdict without further change in the jury composition and, prior to deliberations, the two alternates were dismissed. Since the challenged alternate never participated in the jury's deliberations no further review of petitioner's technical claim is warranted.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MARCH 1973.